Supreme Court of the United States.

OCTOBER TERM, 1945.

RICHARD T. GREEN COMPANY, M. THOMAS GREEN, TRUSTEE OF M. THOMAS GREEN TRUST, AND THE FIRST NATIONAL BANK OF BOSTON,

Petitioners,

v.

CITY OF CHELSEA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinions Below.

The opinion of the District Court for the District of Massachusetts relating to the issue presented by this petition is to be found in the Record at pages 94 to 96. It is reported in *United States* v. *Five Acres of Land*, 56 Fed. Supp. 628, esp. 629-631.

The opinion of the Circuit Court of Appeals for the First Circuit affirming the judgment of the District Court is to be found in the Record at pages 125 to 133, esp. 127-132, but has not yet been reported.

Jurisdiction.

The judgment of the Circuit Court of Appeals for the First Circuit affirming the District Court's decision was

entered on June 1, 1945 (Rec. p. 134). The order denying the petition for rehearing was entered June 27, 1945 (Rec. p. 154).

The jurisdiction of this Court is invoked under section 240(a) of the Judicial Code as amended, United States Code, title 28, section 347(a).

Statement of Facts.

The facts have been stated in the foregoing petition.

Specification of Errors.

It is submitted that the Circuit Court of Appeals erred—

1. In ruling that the law of Massachusetts permitted the cradle and hoisting machinery described in the petition to be taxed as real estate.

2. In ruling that the law of Massachusetts created a lien upon the land taken by the United States for taxes assessed on the foundation of the marine railway, the track structure, the cradle, the hoisting machinery, and the parcel of land on which they were located, valued and assessed as a single unit of real estate.

3. In affirming the judgment of the District Court.

4. In denying the First and Second prayers of the petitioners' petition for rehearing.

Statutes Involved.

The Massachusetts statutes which bear upon the issues are as follows:

General Laws, c. 59, sec. 3: "Real estate for the purpose of taxation shall include all land within the common-

wealth and all buildings and other things erected thereon or affixed thereto."

General Laws, c. 59, sec. 4: ". . . personal estate for the purpose of taxation shall include . . . goods, chattels . . ."

General Laws, c. 59, sec. 5: "The following property . . . shall be exempt from taxation . . . Sixteenth, Property, other than real estate, poles, underground conduits, wires and pipes, and other than machinery . . ." [thus distinguishing "machinery" from "real estate"].

General Laws, c. 59, secs. 45 and 46 [which make careful provision for assessing real and personal property on separate lists].

General Laws, c. 60, sec. 37: "Taxes assessed upon land, . . . shall with all incidental charges and fees be a lien thereon . . ."

Argument.

FIRST: THE CIRCUIT COURT OF APPEALS ERRED IN RULING THAT THE LAW OF MASSACHUSETTS PERMITTED THE CRADLE AND HOISTING MACHINERY DESCRIBED IN THE PETITION TO BE TAXED AS REAL ESTATE.

Upon this question we know of only four pertinent decisions of the Supreme Judicial Court of Massachusetts, all of which are cited in the opinion of the Circuit Court of Appeals (Rec. pp. 129-121):

> *Milligan* v. *Drury*, 130 Mass. 428:
>
> Holding that "two wooden houses and a stable . . . the sills [of which] rested upon timbers laid on the top of the ground" were properly taxed as real estate.

Hall v. *Carney,* 140 Mass. 131:

Holding that the railroad cars on a "railroad . . . located entirely within the limits of the town of Grafton in this Commonwealth . . . of narrow gauge, and the rolling stock [of which] cannot be run on the track of any other railroad in its vicinity" were properly attached as personal property.

Hamilton Manufacturing Company v. *Lowell,* 185 Mass. 114:

Holding that the manufacturing machinery in a cotton mill must be taxed as personal property and could not properly be assessed with the land and mill buildings.

Franklin v. *Metcalfe,* 307 Mass. 386:

Holding that a lunch cart which "stands 'on its own wheels on abutments which are four cement poles' [and with] a brick veneer wall . . . around three sides of the lunch cart," the fourth side being " 'up against' the wall of another building" was properly assessed as a part of the real estate.

The Circuit Court of Appeals seems to have concluded from these decisions that the question whether the cradle and machinery were taxable as real or personal property was one of degree to be determined by weighing the various factors which "impressed" the Court (Rec. p. 129). It seems to us that such is not the conclusion to be drawn. The distinction indicated by the cases seems to us to be between stationary structures used to render some definite place suitable for the carrying on of some activity, and moving or movable apparatus by means of

which some activity may be carried on. This, we submit, is the distinction taken by the common understanding of real and personal property and by the decisions of the Supreme Judicial Court. It was the distinction taken by the Boston and Quincy assessors—sworn officers of Massachusetts cities—who testified in the Land Court case (Rec. pp. 143-148). If that is the correct distinction, the cradle and hoisting machinery were not properly assessed as real estate. We do not elaborate the argument because we do not ask this Court to rule on it. We ask only that the Circuit Court of Appeals be directed to await the decision of the highest court of the state.

SECOND: THE CIRCUIT COURT OF APPEALS ERRED IN RULING THAT THE LAW OF MASSACHUSETTS CREATED A LIEN UPON THE LAND TAKEN BY THE UNITED STATES FOR TAXES ASSESSED ON THE FOUNDATION OF THE MARINE RAILWAY, THE TRACK STRUCTURE, THE CRADLE, THE HOISTING MACHINERY, AND THE PARCEL OF LAND ON WHICH THEY WERE LOCATED, VALUED AND ASSESSED AS A SINGLE UNIT OF REAL ESTATE.

We do not understand it to be disputed that this proposition follows inevitably if the first proposition is correct. The District Court allowed the appellants' requested ruling (Rec. p. 79) that—

> "11. The laws of Massachusetts at all times material to the issue were such that a single tax assessed upon real and personal estate belonging to the same owner created no lien upon the real estate" (Rec. p. 72).

That this ruling was correct follows necessarily from the fact that there is no lien for taxes in Massachusetts except by statute—

Dunham v. *Lowell*, 200 Mass. 468 (p. 469):

> "Indeed there never is any lien upon real estate for taxes unless given by statute . . ."—

and from the text of Mass. General Laws, c. 60, sec. 37, which reads that—

> "SECTION 37. Taxes assessed upon land . . . shall with all incidental charges and fees be a lien thereon . . ."

See also—

> *Hamilton Manufacturing Company* v. *Lowell*, 185 Mass. 114 (p. 117):
>
> "Under our statutes and decisions, real estate and personal estate are two distinct classes of property for the purpose of taxation. . . . Taxes upon real estate are a lien upon the property, and may be collected by a sale of it, while taxes upon personal property cannot be collected in this way."

THIRD: THE CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING THE JUDGMENT OF THE DISTRICT COURT.

This follows necessarily from the FIRST and SECOND propositions and from the fact that by far the greater part of the disputed tax lien rests upon the erroneous rulings there alleged (Rec. pp. 79-84).

FOURTH: THE CIRCUIT COURT OF APPEALS ERRED IN DENYING THE FIRST AND SECOND PRAYERS OF THE PETITIONERS' PETITION FOR REHEARING.

We recognize that this proposition goes somewhat beyond any adjudicated decision of this Court. But we submit that it is supported in principle by this Court's deci-

sions, and by the demands of practical justice in the present case.

The Court is familiar with the long series of recent cases in which it has repeatedly affirmed the duty of Federal courts, when confronted with a question of State law for decision, to make every practicable effort to decide it as it would be decided if presented to the State courts.

Erie Railroad Company v. *Tompkins,* 304 U.S. 64.

Fidelity Union Trust Company v. *Field,* 311 U.S. 169.

Six Companies of California v. *Joint Highway District,* 311 U.S. 180.

West v. *American Telephone & Telegraph Company,* 311 U.S. 223.

Vandenbark v. *Owens-Illinois Glass Company,* 311 U.S. 538.

Moore v. *Illinois Central Railroad Company,* 312 U.S. 630.

Klaxon Company v. *Stentor Electric Manufacturing Company,* 313 U.S. 487.

The latest of this series which has come to our attention is—

Huddleston v. *Dwyer,* 322 U.S. 232—

where this Court held it to be the duty of a Circuit Court of Appeals—after it had rendered its decision and denied one petition for rehearing—to grant a second petition for rehearing for the purpose of ascertaining whether an intervening decision of the highest court of Oklahoma did or did not establish the proposition that its ruling as to the law of Oklahoma was wrong.

Ideally, the doctrine of these decisions calls for a system of appeals from Federal to State courts on State ques-

tions, precisely as the decisions of State courts upon Federal questions may be reviewed upon certiorari by this Court. The Circuit Court of Appeals for the Seventh Circuit has perceived this, and has ruled, in a case substantially on all fours with the present, that the parties should be remitted to the State court to determine the contested question of the validity of the State tax lien.

United States v. *150.29 Acres of Land in Milwaukee County,* 135 Fed. 878:

> (P. 881.) "On the second question, as to when the lien for taxes attached, we are unable from an examination of the authorities to answer to our complete satisfaction the question as to when the lien for taxes does attach under the Wisconsin law. This is a matter of vital concern to Wisconsin. We hesitate to intrude ourselves into a situation that requires us to make a decision as to what the law of Wisconsin is, when we are not able to discern with assurance what that law is. Since we are in doubt as to what the law of Wisconsin is on that point, we think it advisable to remand the case to the District Court with instructions to retain jurisdiction until the parties can seek the answer to this question in the courts of Wisconsin [citations omitted]. This course is clearly indicated, because the controversy is in its last analysis one between a taxpayer and a taxing unit of Wisconsin. It is a Wisconsin question, of primary interest to Wisconsin and its taxpayers.
>
> "The cause is remanded to the District Court to retain jurisdiction until the parties can litigate the question here raised in the courts of Wisconsin, or otherwise dispose of the case."

The record and briefs in the case just cited do not disclose that any specific proceedings in the courts of Wisconsin

were then either pending or proposed. Perhaps, therefore, it may be contended that the case is overruled on its facts by this Court's decision in—

Meredith v. *Winter Haven,* 320 U.S. 228.

But in *Meredith* v. *Winter Haven* the lower court had dismissed the suit—it had not, as here and in *United States* v. *150.29 Acres of Land,* retained jurisdiction. And in neither *United States* v. *150.29 Acres of Land* nor *Meredith* v. *Winter Haven* was there another proceeding already pending in the State court between the same parties in which the precise question before the Federal court was the only question to be resolved. Where—as in the present case—there is a pending State court proceeding between the same parties which is not removable and which can operate in substance as an appeal from the Federal courts to the State's court of last resort, we submit that the Federal court should await the outcome of that appeal. The practical reasons for such action seem to us not less weighty than the practical reasons for the rule which was stated as follows in *Meredith* v. *Winter Haven, supra,* by this Court (320 U.S. 236):

> "So too a federal court, adhering to the salutary policy of refraining from the unnecessary decision of constitutional questions, may stay proceedings before it, to enable the parties to litigate first in the state courts questions of state law, decision of which is preliminary to, and may render unnecessary, decision of the constitutional questions presented. *Railroad Commission* v. *Pullman Co.,* 312 U.S. 496; cf. *Thompson* v. *Magnolia Petroleum Co.,* 309 U.S. 478. It is the court's duty to do so when a suit is pending in the state courts, where the state questions can be conveniently and authoritatively answered, at least where

the parties to the federal court action are not strangers to the state action. *Chicago* v. *Fieldcrest Dairies*, 316 U.S. 168."

To do otherwise is to risk contradictory decisions of the same issue between the same parties which could not well appear otherwise than as a plain denial of justice to laymen unfamiliar with the mysteries of the law.

Conclusion.

For the reasons above given and on the authority of the cases cited, it is respectfully submitted that the writ of certiorari should be granted.

Respectfully submitted,

SAMUEL HOAR,

GEORGE K. GARDNER,

Counsel for Petitioners.